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Fred Leutner (Leutner.Fred@EPA.gov)
Office of Science and Technology
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code 4305T
Washington, DC 20460

Re: Potential Reinterpretation of a Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs and Streamlining Section 518(e) Treatment as State

Dear Mr. Leutner:

I work with WaterLegacy, a Minnesota non-profit organization formed to protect Minnesota water resources and the communities that rely on them. We've read with interest EPA's proposal under consideration: "Potential Reinterpretation of a Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs" and the webinar slides from last spring, "Rulemaking to Provide More Opportunities for Tribes to Engage in the Clean Water Act Impair ed Water Listing and Total Maximum Daily Load Program."

We applaud EPA's proposal that would remove the additional step of requiring Tribes to demonstrate regulatory jurisdiction over clean water within reservations under the second test of *Montana v. United States*, 450 U.S. 544 (1981). We understand that the EPA proposes that a new interpretive rule would state that Clean Water Act Section 518(e) provides an express delegation of authority by Congress to administer water quality standards regulatory programs within reservations.

Although we agree with the statement that Section 518(e) provides such a clear delegation, we believe that the EPA's interpretive rule should also affirm that Tribes have inherent sovereign authority recognized in the *Montana* case and subsequent precedent to regulate water quality in order to protect the political integrity, the economic security, the health, or the welfare of the Tribe. The EPA's interpretation that regulatory programs are authorized by Congressional delegation and require no additional factual demonstrations does not diminish the inherent authority of Tribes to regulate water quality.

WaterLegacy also supports EPA's proposal to facilitate Tribes in more readily exercising the authorities delegated by Congress under Section 518(e) of the Clean Water Act, including Impaired Water Listing and Total Maximum Daily Load Program under Section 303(d). However, we would respectfully suggest that the approach proposed by the EPA may be unnecessarily cumbersome.

WaterLegacy would recommend that, rather than proceed separately and incrementally with rulemaking for Section 303(d) and, eventually, for the NPDES permit program under Section

402, the EPA address these delegated authorities along with the simplification proposed to address delegated authority under Section 518(e).

We perceive no requirement under Section 518(e) for multiple layers of proof whenever a Tribe seeks to exercise Clean Water Act authority. In fact, the statute lists all of the areas where a Tribe may exercise authority under the Clean Water Act in one series, suggesting that Congress would have anticipated one demonstration of authority and capacity would suffice. The statute, thus, lists the requirements for a Tribe to demonstrate governance, the functions sought to be exercised and capacity under one paragraph stating, "The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 of this title to the degree necessary to carry out the objectives of this section." 33 U.S.C. §1377(e), CWA Section 518(e).

WaterLegacy would recommend the following to address treatment as a state for Tribes:

- EPA proceed with the proposed interpretive rule stating that Section 518(e) provides express delegated authority to Tribes to administer water quality programs within reservations without any additional demonstration of inherent regulatory authority.

- EPA also state in this interpretive rule that nothing in either Section 518(e) or EPA's rules or interpretation is intended to or serves in any way to diminish tribal inherent sovereign authority to regulate water quality.

- EPA further state in its interpretive rule that in recognition of Congressional delegation of authority to Tribes to exercise all of the enumerated functions in Clean Water Act Section 518(e) (33 U.S.C. §§ 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346), EPA will also streamline the process whereby Tribes exercise these authorities. TAS for any of the enumerated functions in Section 518(e) will be approved when the Tribe designates functions and tribal waters where TAS would be exercised and demonstrates a reasonable expectation of capacity to carry out these functions.

WaterLegacy believes that interpreting Section 518(e) to provide a broad, unitary delegation of Clean Water Act authority to Tribes is consistent with the statutory text, with respect for inherent tribal sovereignty and with recent EPA Guidance recognizing tribal rights to self-determination. It would also be more efficient than a piecemeal approach. We would note that EPA would continue to have the authority to review and evaluate compliance with Clean Water Act requirements when impaired waters lists, TMDLs and NPDES permits are generated by Tribes.

We look forward to your response and invite contact by phone (651-646-8890) or email (pmaccabee@justchangelaw.com). Thank you in advance for your efforts to facilitate tribal exercise of authority under Section 518(e) of the Clean Water Act.

Sincerely yours,

Paula J. Maccabee

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